No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENT

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TABLE OF AUTHORITIES
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CASES

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OTHER AUTHORITIES

Amy Myrick et. al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y 705 (2012).....11

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Jack Greenberg, *Crusaders in the Courts* (1994).....1, 2, 6

Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801 (2010).....4

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

Since the enactment of the Civil Rights Act of 1965, LDF has helped Americans vindicate their rights under Title VII by means of its private right of action.[2] LDF represented plaintiffs in cases such as, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has also filed *amicus* briefs in this Court in important Title VII cases such as *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). LDF

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* state that both parties have filed blanket consent to the filing of *amicus briefs*.

[2] *See, e.g.*, Jack Greenberg, *Crusaders in the Courts* 412–29 (1994).

has a strong interest in the proper interpretation and application of Title VII.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII is an essential part of one of our nation's most important civil rights laws, the Civil Rights Act of 1964.[3] It is designed to ensure that employment opportunities—the key for most Americans to economic security and social mobility—are not limited by a person's race, religion, sex, or national origin. Title VII's private right of action is central to achieving this goal, and private plaintiffs have played a major role in enforcing the statute.[4] That was Congress's expectation and intent. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994).

In crafting the private right of action, Congress chose to create statutory preconditions for that aspect of Title VII. This case involves the precondition mandating that plaintiffs file a charge with the Equal Employment Opportunity Commission (EEOC). No one questions that the requirement is in fact a requirement, or that it serves useful purposes. The issue is whether Congress meant to condition the judiciary's ability to exercise its power on strict compliance with this requirement, even if an employer does not raise it as a defense. Every relevant indication suggests that Congress did not.

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[3] *See, e.g.*, Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 Am. U. L. Rev. 339, 344 & n.31 (1986) (citing B. Schlei & P. Grossman, *Employment Discrimination Law* vii (2d ed. 1983)).

[4] *See, e.g.*, Greenberg, *supra* note 2, at 412–29 (describing LDF's work representing private plaintiffs in the early years of Title VII).

Congress knew, and this Court has recognized, that unschooled nonlawyers would often be tasked with satisfying Title VII's statutory preconditions. Classifying those preconditions as jurisdictional can have severe results for those private parties' access to justice and their ability to carry out the responsibility that Congress tasked them with as private attorneys general. And, the incorrect classification of a rule as jurisdictional creates a risk of sandbagging and places unwarranted burdens on the lower courts.

"[P]rocedural rules . . . cabin a court's power only if Congress has clearly state[d] as much." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (internal quotation marks and citation omitted) (second alteration in original). That mandate applies with special force to a statutory scheme aimed at providing all Americans with access to the courts to defend themselves from discrimination at work. The Court should affirm that principle and affirm the court below.

ARGUMENT

I. ACCESS TO A ROBUST PRIVATE RIGHT OF ACTION IS INTEGRAL TO TITLE VII'S EFFECTUATION.

A. Congress Fashioned the Private Right of Action as a Primary Mechanism for Compelling Compliance with Title VII.

Of the many ways racism has blighted our democracy, economic and employment-based injustice

and exclusion rank among the most pervasive.[5] Slavery involved the unadulterated theft of African American labor.[6] Even in the non-slave states, antebellum African Americans were relegated to "menial employment in service positions[.]"[7] After the Civil War, the reign of terror that swept the South was motivated, in part, by a desire to ensure a racialized employment hierarchy that forced African Americans "into the least remunerative and lowest-status employment sectors."[8] In the leadup to the Civil Rights Act of 1964, it was clear that African Americans "would never be free and equal citizens" if private discrimination—e.g., employment discrimination—continued unchecked.[9] It was no accident that the famed 1963 March on Washington was titled, in full, the "March on Washington for Jobs and Freedom."[10]

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[5] *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Fla. L. Rev. 251, 262–67 (2011) [hereinafter *A Social Movement History*].

[6] *See, e.g.*, Eric Foner, *Remarks at the Conference on the Second Founding November 14, 2008*, 11 U. Pa. J. Const. L. 1289, 1292 & n.13 (2009) (quoting President Lincoln's Second Inaugural).

[7] Susan D. Carle, *How Myth-Busting About the Historical Goals of Civil Rights Activism Can Illuminate Future Paths*, 7 Stan. J. Civ. Rts. & Civ. Liberties 167, 169 (2011) [hereinafter *Myth-Busting*]; *see also A Social Movement History*, *supra* note 5, at 262 & n.63.

[8] *A Social Movement History*, *supra* note 5, at 263 & n.65; *see also Myth-Busting*, *supra* note 7, at 169–71 (observing racist economic exclusion in South and North).

[9] Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1834 (2010).

[10] *Id.* at 1833 (observing that the full name was "a reference to private employment discrimination").

Against that backdrop, Congress included Title VII in the Civil Rights Act of 1964, "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To accomplish that goal, Congress selected "private attorney[s] general" as its "chosen instrument[s.]" *Fogerty*, 510 U.S. at 523 (first alteration in original) (internal quotation marks and citations omitted); *see also N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980). Accordingly, in its earliest form Title VII included the private right of action Respondent employed here, *see Alexander*, 415 U.S. at 45.

This choice was critical. The administrative agency created as part of Title VII—the EEOC—initially lacked power either to bring suit or issue binding orders to employers.[11] This was a deliberate choice, the product of key congressmembers' demand that the EEOC not follow the model of the National Labor Relations Board, i.e., an agency with the power to issue final decisions to which the courts would defer substantially.[12] Rather than grant the EEOC ultimate adjudicatory authority over employment discrimination allegations, Congress instead chose to leave "final responsibility for enforcement of Title VII" with the federal courts, principally via de novo

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[11] *See* Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 Yale L. & Pol'y Rev. 119, 127–28 (2014)

[12] *See id.* at 127; Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963–1976*, 23 Stud. Am. Pol. Dev. 23, 32–33 (2009).

suits brought by private parties. *Alexander*, 415 U.S. at 44; *see also Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 824 n.4 (1990); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 469–70 & n.7 (1982); *Alexander*, 415 U.S. at 60 & n.21.[13] Congress showed its commitment to this path by granting courts authority to waive filing fees and appoint counsel for plaintiffs, and providing for attorney's fees to winning plaintiffs—all departures from the baseline rules.[14] In the years following 1964, private parties relying on the private right of action worked a transformation "almost on par with the campaign that won *Brown* [*v. Board of Education*, 347 U.S. 483 (1954)]."[15]

To be sure, Title VII does not work only through litigation. In fact, Congress sought to make "cooperation and voluntary compliance" the "preferred means" of achieving the statute's goals. *Alexander*, 415 U.S. at 44. To that end, Congress established procedures to aid and guide conciliation. Among other things, it established statutory preconditions for access to the private right of action, including the charge-filing requirement at issue here. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 260, § 706(e) (1964). Despite one set of amendments to its operation, that requirement

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[13] *See also* Bornstein, *supra* note 11, at 126–28. The only exception was that the Attorney General could sue employers who exhibited a "pattern or practice of resistance" to the rights Title VII secured. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. Rev. 431, 452 & n.90 (citing Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 261, § 707(a) (1964)).

[14] *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 260–61, § 706(e), (k) (1964); Farhang, *supra* note 12, at 37–38.

[15] Greenberg, *supra* note 2, at 412.

effectively works today as it did in 1964. As it did then, it requires the putative plaintiff to file a charge stemming from an unlawful employment practice within a certain amount of time. If the EEOC dismisses the charge, or if within a certain time period the EEOC has neither "entered into a conciliation agreement" to which the aggrieved person is party nor filed suit[16] on the charge, the statute requires the EEOC to notify[17] the charge filer of the right to sue the entity named in the charge, at which point the individual may sue. 42 U.S.C. § 2000e-5(f)(1).[18]

Like the other presuit requirements, the charge-filing requirement at bottom works to "give the [EEOC] a chance to investigate the charge and decide whether to sue" (ever since the 1972 amendments gave it that power) and "to encourage the complainant and the employer, with or without [a] state agency's

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[16] In a case involving a governmental entity, the Attorney General is the entity with the option of filing suit. *See* 42 U.S.C. § 2000e-5(f)(1).

[17] In a governmental-entity case, the Attorney General has the notification responsibility. *See* 42 U.S.C. § 2000e-5(f)(1).

[18] Title VII's 1972 amendments changed the post-charge events necessary to trigger the notification to the charge filer. Originally the private charge filer was able to obtain the notification if the EEOC was unable to "obtain voluntary compliance" within a particular time period. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 260, § 706(e) (1964). The current mechanism stems from the 1972 amendments. *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 105–06 (1972) (establishing steps now found in 42 U.S.C. § 2000e-5(f)(1)). The underlying principle did not change: if enough time passes and the situation remains unresolved from the employee's perspective, he or she should be able to sue. *See* Bornstein, *supra* note 11, at 128.

or the EEOC's assistance, to resolve their dispute informally." *Doe v. Oberweis Dairy*, 456 F.3d 704, 708 (7th Cir. 2006). But Congress was not naïve; conciliation and cooperation cannot eradicate all deep-rooted bias. Sometimes compliance must be compelled. The presuit requirements contemplate that conciliation may not resolve the issues on the table, and they permit an individual who has filed a charge to exit the process based on nothing more than their preference and the passage of time. *See Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 365–66 (1977) (agreeing that the "private right of action . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays" caused by the EEOC and works to ensure a remedy where there is "agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution" (citation omitted)); *see also supra* note 18.

Title VII's major amendments have reiterated the private right of action's importance. Thus, while the 1972 amendments gave the EEOC authority to sue on a charge if it chose and increased some of its investigative power (while still denying it the power to issue binding orders), that increase in EEOC power "was intended to supplement, not replace, the private action." *General Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980); *see also Alexander*, 415 U.S. at 44–45. Indeed, Congress declined to adopt proposals to eliminate or weaken the private right of action during the debates leading up to the 1972 amendments.[19] During those debates, proponents of

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[19] Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and*

robust civil rights enforcement like LDF Director-Counsel Jack Greenberg emphasized that the private right of action was "essential" to Title VII's operation.[20] It was ultimately retained, and "remain[ed] . . . essential" to Title VII's operation. *Alexander*, 415 U.S. at 45; *see also EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 n.21 (1981) (observing that the 1972 amendments provided a "strong reaffirmation of the importance of the private right of action in the Title VII enforcement scheme").

For their part, the 1991 amendments to Title VII "doubled down on [Congress's] reliance on private lawsuits as the primary means of enforcing the Act."[21] Faced with evidence that meritorious private cases were not being brought because of a dearth of counsel to prosecute them,[22] Congress sought to strengthen private remedies to encourage the private bar to represent private plaintiffs.[23]

Today, in keeping with Congress's original plan, private suits continue to be the primary means of enforcing Title VII.[24] As this Court observed in 1974, "Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims." *Alexander*, 415

Administration of the Law, 2 Berkeley J. Emp. & Lab. L. 1, 35–38 (1977); Farhang, *supra* note 12, at 44.

[20] Hill, *supra* note 19, at 37 (citation omitted).

[21] Bornstein, *supra* note 11, at 129.

[22] *See* Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. Empirical Legal Stud. 1, 12–13 (2009).

[23] Bornstein, *supra* note 11, at 129, 131.

[24] *See id.* at 130 (plaintiffs file over 50 times as many lawsuits as the EEOC manages to file).

U.S. at 60 n.21. And it remains "the duty of courts to assure the full availability of [that] forum." *Id.*

B. The History, Purpose, and Role of Title VII's Private Attorneys General Confirm that Presuit Filing Requirements Are Not Jurisdictional.

This case is about how Congress intended to condition access to the judicial forum and the effect—if any—it intended a private person's noncompliance with presuit conditions to have on judicial power to hear Title VII cases, even when they are not timely raised by a defendant. This Court has long understood that the history and purpose of Title VII shape that inquiry. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Here, the importance of private attorneys general in enforcing Title VII weighs against interpreting presuit filing requirements as jurisdictional. Lay people generally initiate Title VII's machinery without legal aid. *See id.* at 397; *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 831 (7th Cir. 2015) ("Most EEOC charges are . . . drafted by laypersons rather than lawyers[.]"). Congress knew, moreover, that these laypersons would often be unschooled relative to the average civil litigant. *See Castner v. Colo. Springs Cablevision*, 979 F.2d 1417, 1421 (10th Cir. 1992) ("Title VII actions more often than not pit[] parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent."

(quoting H.R. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 2137, 2148)).[25]

The potential difficulties for a lay attorney general seeking to fully comply with Title VII's charge-filing requirement underscores the impropriety of calling it jurisdictional. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513–15 (2006) (looking to the "consequences" and potential "unfair[ness]" of typing a Title VII rule jurisdictional (alteration in original) (citation omitted)). Here, before filing suit, Respondent wrote "Religion" in the "Other" box in the section of the Texas employment-discrimination agency's questionnaire captioned "Employment Harms or Actions." J.A. 71, 89–90. The signature box of that questionnaire described the document as a "charge" that would "be filed with . . . the EEOC[.]" *Id.* 90. It is not hard to imagine a reasonable nonlawyer believing this met the statutory requirement.[26] Without more, that might not excuse noncompliance, but it ought to be relevant to a court's decision whether (for example) a defendant who raises noncompliance late in the day can achieve dismissal.

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[25] Recent statistics support this analysis. A 2012 study found that more than 20% of plaintiffs filing discrimination claims in court represent themselves at the time of filing. Amy Myrick et. al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y 705, 714 & tbl. 1(2012). Those numbers are surely more pronounced at the presuit filing stage. What's more, race plays a role, with African American plaintiffs nearly three times as likely as white plaintiffs to represent themselves when filing discrimination lawsuits. *Id.*

[26] Whether Respondent in fact failed to meet the requirement remains a disputed question not presented for this Court's decision. *See* Resp. Br. at 46 n.17. The point is that what compliance entails may not be obvious to a nonlawyer.

After all, the "general consensus" that "courts may not consider bases of discrimination that are not asserted in the charge" is one that "courts generally have applied . . . flexibly, as a condition precedent[.]" II Linderman et al., *Employment Discrimination Law* 29-28 to 29-30 (5th ed. 2012).

Worse, the harsh jurisdictional rule Petitioner seeks would affect plaintiffs beyond this context. Consider, for example, a complainant who believes she was retaliated against because of her race. A lay complainant should not be expected to have the mastery of Title VII's legal categories that would ensure that her charge's description of her experience parses out those categories, or that she checks *both* "race" and "retaliation" on a given checkbox array. But under Petitioner's rule, her failure to do so may have created a snare that could require her case's dismissal, despite any considerations of equity or judicial efficiency. As Respondent points out, Petitioner would transform the myriad ways that a defendant might question a charge's "adequacy" into jurisdictional issues. Resp. Br. at 32–33. Given the potential complexity of these questions, and the prevalence of lay filers, it is unreasonable to conclude that Congress meant to strip the courts of the power to make equitable considerations in terms of burden, fairness, and efficiency when analyzing charge filings. On the contrary, the remedial purpose of Title VII requires that courts retain the power to employ equitable considerations in determining whether a party has met its statutory requirements. *See Zipes*, 455 U.S. at 397–98.

The informal and reconciliation-minded EEOC process may benefit victims of discrimination by

affording a venue for relief before they reach litigation. But when they come to court, an unwarranted jurisdictional gloss on Title VII's charge-filing provisions may strip them of a fair chance to vindicate their rights under the statute by allowing an employer to raise the issue even after years of litigation, discovery, dispositive motions, and even appeals. That result at least undoes years that a plaintiff may have invested in seeking a remedy. While always wasteful, this sort of delay is "especially unfortunate" in the Title VII context, where "[t]he claimant cannot afford to stand aside while the wheels of justice grind slowly toward . . . ultimate resolution[.]" *Ford Motor Co. v. EEOC*, 458 U.S. 219, 221 (1982).

Nothing in the statute indicates, let alone clearly, that Congress meant to allow such interference with the enforcement of Title VII by private plaintiffs. *See Kwai Fun Wong*, 135 S. Ct. at 1632 (recognizing that a "procedural rule[]" can be jurisdictional "only if" Congress clearly indicates it as such); *United States v. Spaulding*, 802 F.3d 1110, 1129 (10th Cir. 2015) (Gorsuch, J., dissenting) ("[W]e should read legislation as 'cabin[ing] a court's power'—its jurisdiction—'only if Congress has clearly stated as much.'" (quoting *Kwai Fun Wong*, 135 S. Ct. at 1632) (second alteration in original)). The Court can affirm that a charge is statutorily required without imposing this severe result.

II. RELATED TITLE VII PROVISIONS CONFIRM THAT THE CHARGE-FILING REQUIREMENT IS NONJURISDICTIONAL.

Statutory context matters. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010) ("[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."). Judicial treatment of the most closely related Title VII provisions confirms the charge-filing requirement is not jurisdictional.

First, consider *Zipes*, which, at a minimum, held that timely filing a charge was nonjurisdictional. *See* 455 U.S. at 393. And, in addressing the specific issue of timeliness, the Court stated even more broadly that "Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.* at 397. Later cases describing *Zipes* have picked up on that principle. *See Reed Elsevier, Inc.*, 559 U.S. at 169 n.8 ("[O]ur holding in *Zipes* [was] that Title VII's EEOC filing requirement was nonjurisdictional[.]"); *Union Pac. Ry. Co. v. Bhd. of Locomotive Engineers*, 558 U.S. 67, 83 (2009) ("[P]resuit resort to the EEOC [was] held forfeitable in *Zipes*[.]"). This is inconsistent with Petitioner's desired distinction between timely filing and filing a charge at all. *See* Pet'r Br. at 34. Even if the distinction could be drawn, Petitioner's interpretation would create the anomalous result of Title VII containing two intricately interwoven charge requirements, one of which is jurisdictional and one of which is not. These directives to the individual—file a charge, and ensure it is timely—

seem to "speak" equally "to the rights or obligations" of that individual, which should render them both nonjurisdictional "'claim-processing'" rules. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1158 (10th Cir. 2013) (Gorsuch, J., concurring) (quoting *Reed Elsevier*, 559 U.S. at 161), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

The other major presuit requirement is the "giving of [a] notice" (i.e., the "right-to-sue letter") by the EEOC (or Attorney General in a case involving a governmental entity) that the EEOC has dismissed the charge, failed to reach a conciliation agreement to which the aggrieved person is party, or failed to sue the party named in the charge. 42 U.S.C. § 2000e-5(f)(1).[27] The lower courts that have addressed the issue have held this requirement not to be a jurisdictional prerequisite.[28] Those courts have

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[27] The Attorney General, rather than the EEOC, is granted the power to sue in cases involving governmental entities. 42 U.S.C. § 2000e-5(f)(1).

[28] *See Martinez-Rivera v. Puerto Rico*, 812 F.3d 69, 77–78 (1st Cir. 2016) (Americans with Disabilities Act case incorporating Title VII's presuit provisions); *Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 474 (2d. Cir. 1999); *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 (3d. Cir. 1984); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 679–80 (5th Cir. 1985); *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1031–32 (6th Cir. 1998); *Worth v. Tyler*, 276 F.3d 249, 259 (7th Cir. 2001); *Jones v. Am. State Bank*, 857 F.2d 494, 499–500 (8th Cir. 1988); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1104–05 (9th Cir. 2008); *Forehand v. Fla. State Hosp. at Chattahoochee*, 89 F.3d 1562, 1569–70 & n.17 (11th Cir. 1996); *Williams v. WMATA*, 721 F.2d 1412, 1418 n.12 (D.C. Cir. 1983) (per curiam). The Fourth Circuit's law is harder to categorize. Beginning in a 1982 case (which did not cite *Zipes*), it has said that "entitlement" to a right-to-sue letter is jurisdictional although its "issuance or

understood *Zipes* properly: as establishing a broad interpretive principle for Title VII's presuit requirements. For example, many explicitly invoke *Zipes*'s methodology, *see* 455 U.S. at 393–94, in asking whether Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), contains or refers to the right-to-sue requirement (it does not). *See, e.g.*, *Martinez-Rivera v. Puerto Rico*, 812 F.3d 69, 77 (1st Cir. 2016); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1104 (9th Cir. 2008); *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th Cir. 1998); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 680 (5th Cir. 1985). The law here is sufficiently clear for a leading treatise to state simply that "[c]ourts have not treated [receipt of the right-to-sue letter] as a jurisdictional prerequisite to suit under Title VII[.]" Linderman et al., *supra*, at 29-9.

Petitioner's *amici* miss the mark in suggesting otherwise. *See* Br. *Amici Curiae* of the Center for Workplace Compliance, National Federation of Independent Business Small Business Legal Center, Chamber of Commerce of the United States of America, and National Retail Federation at 10, 12, 18. Indeed, *amici* inadvertently undermine their argument by citing *Mach Mining* to support it. *See id.* at 12 (citing *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015)). On the page of that opinion *amici*

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receipt" is not—a holding based on considerations of "equity" and statutory "polic[y]." *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1091, 1093–95 (4th Cir. 1982). This "entitlement" rule arguably crafts an equitable exception to a statutory provision that asks whether the letter has been "giv[en][,]" 42 U.S.C. § 2000e-5(f)(1). Its references to "jurisdiction" may be best explained as one of the formerly prevalent "drive-by jurisdictional ruling[s]" that this Court has worked to eradicate. *Arbaugh*, 546 U.S. at 511 (citation omitted).

cite, this Court first explained that plaintiffs may sue under Title VII "only if" they have "first filed a timely charge" and that courts "usually" dismiss a complaint for noncompliance. *Mach Mining*, 135 S. Ct. at 1651. That is, as *Zipes* holds, noncompliance is sometimes excusable. "Similarly," the Court continued, "an employee must obtain a right-to-sue letter" to sue—"and a court will *typically* insist on satisfaction of that condition." *Id.* (emphasis added). A *jurisdictional* requirement admits of no exceptions, typical or atypical. *Mach Mining*, in other words, aligns with the consistent approach of the lower courts: receipt of the right-to-sue letter is not jurisdictional.

The timeliness requirement and the right-to-sue-letter requirement are like the charge-filing requirement in every way that matters.[29] All relevant parts of the process, they "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (describing nonjurisdictional "claim-processing rules"). And, all situated outside of Title VII's "jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3)," *Arbaugh*, 546 U.S. at 515, they give no hint of "govern[ing] a court's adjudicatory authority[,]" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (internal quotation marks and citation omitted). While filing deadlines are "quintessential claim-processing rules," *Henderson*, 562 U.S. at 435, no case suggests that filing deadlines are the only nonjurisdictional claim-

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[29] *Amicus* assumes for present purposes that the "timeliness requirement" and the "charge-filing requirement" are indeed independent, as Petitioner apparently believes, given that it is not asking this Court to overrule *Zipes*.

processing rules. There are many ways a requirement may "speak . . . to the rights or obligations of the parties" rather than to "the power of the court[.]" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

That is exactly what the charge-filing requirement does. No one doubts that it is required, or that it serves useful purposes. But a condition should not "be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9. It certainly should not be classified as such where text and context do not indicate Congress meant noncompliance to oust the courts of jurisdiction.

III. CONSIDERATIONS OF JUDICIAL EFFICIENCY AND FAIRNESS INDICATE THAT THE CHARGE-FILING REQUIREMENT IS NOT JURISDICTIONAL.

This Court has long recognized that careless application of the word "jurisdictional" has negative, structural consequences for fairness and efficiency. *See Henderson*, 562 U.S. at 435 ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."). Many statutes impose prerequisites to filing on potential litigants, but "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Reed Elsevier, Inc.*, 559 U.S. at 166 (quoting *Zipes*, 455 U.S. at 393).

Determining whether a requirement is jurisdictional requires looking not only at the language, structure, and context of the statute, but also at its purpose and the effect of a jurisdictional bar on fairness and judicial economy. *See, e.g.*, *Gonzalez*, 565 U.S. at 141–44 (finding that the "unfair prejudice" that would result from jurisdictional treatment of a provision counseled against holding it jurisdictional) (alteration omitted) (citation omitted); *Arbaugh*, 546 U.S. at 513–14 (resolving a Title VII jurisdictional question "mindful of the consequences" associated with "typing [it] a determinant of subject-matter jurisdiction"); *id.* at 515 (finding it the "sounder course" to "refrain from constricting" federal-question jurisdiction or "Title VII's jurisdictional provision" given "the unfair[ness] and waste of judicial resources" that a jurisdictional rule would cause (alteration in original) (internal quotation marks and citation omitted); *Zipes*, 455 U.S. at 398 (looking to the "remedial purpose of" Title VII in refusing to hold a rule jurisdictional). That is particularly true in the Title VII context, where this Court's interpretive "guiding principle" has been that "technical" readings are "'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). This case presents a paradigmatic example of how considerations of fairness and judicial economy counsel against a jurisdictional bar.

First, as discussed in Part I.B, the elevated risk of traps for the unwary in this context counsel against interpreting the presuit filing requirement as jurisdictional.

Second, an unwarranted jurisdictional rule also undermines judicial efficiency and permits sandbagging. Characterizing any rule as jurisdictional inherently adds to the lower courts' burden by obligating them in every case to ensure the rule has been satisfied. *See Arbaugh*, 546 U.S. at 514. Beyond that intrinsic burden, this case exemplifies the further potential drain on judicial resources from a jurisdictional rule. Here, Petitioner was put on notice of Respondent's religious discrimination claim, at the latest, in January 2012. *See* J.A. 16, 22–24 (original complaint raising religious discrimination claim filed January 13, 2012). The parties exchanged pleadings, engaged in discovery, filed dispositive motions, and appealed the district court's resolution of those motions, all without Petitioner raising any question of the adequacy of the EEOC charge. *See id.* 7–15 (district court docket). Only after years of litigation did Petitioner challenge the adequacy of the EEOC charge, requesting that the district court summarily discard years of work. This is exactly the type of potentially "wasted" effort that this Court has warned should not be "lightly" mandated. *Gonzalez*, 565 U.S. at 141 (citation omitted).[30]

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[30] The operative complaint contains no state-law claims, but as this Court noted in *Arbaugh*, imposing a rule that would require the jurisdictional dismissal of a complaint's federal claims would also require dismissing the "complaint in its entirety," i.e., including any pendent state-law claims. 546 U.S. at 514. Characterizing a rule as requiring merely a nonjurisdictional dismissal means the court "retains discretion" to keep jurisdiction over pendent state-law claims. *Id.* That discretion may be significant where a court has already expended substantial energy on the state-law claim and there is no reason the state courts would be better suited to address it.

Judicial efficiency is also protected by removing incentives for judicial resources to be misused. We do not know why Respondent failed to raise this issue until years after it ought to have known of it. Whatever the cause in this case, typing this rule jurisdictional makes it more likely that defendants will fail to raise charge inadequacy until well into a case. It may encourage negligence on this front by reducing the cost of a defendant sleeping on its rights, and it may encourage a defendant—wisely or unwisely—to attempt strategically to "hold in reserve" an inadequacy.

In sum, this case involves a remedial statutory scheme protecting fundamental civil rights, often initiated by unschooled and pro se litigants. It would be anomalous to prevent courts from applying principles of equity to the charge-filing requirement. Congress did not intend to "disarm litigants" and "waste . . . adjudicatory resources," *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013), by conditioning federal jurisdiction on Title VII's charge-filing requirement.

CONCLUSION

Absent any indication that the charge-filing requirement has jurisdictional status and given Congress's clear intent that the private right of action remain robust, this Court should reaffirm its "guiding principle" for interpreting Title VII and affirm the court below.

Respectfully submitted,

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